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No. 80-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRINCETON UNIVERSITY and STATE OF NEW JERSEY
Appellants,

v.

CHRIS SCHMID,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF APPELLANT PRINCETON UNIVERSITY

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QUESTIONS PRESENTED

1. Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

2. Whether the owner of private property, who was a party below, has standing to appeal a decision overturning a criminal trespass conviction where the basis for the decision is that, under state law, the property owner is constitutionally obligated to permit expressive activities by members of the general public on his property.

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BRIEF OF APPELLANT PRINCETON UNIVERSITY

DECISIONS BELOW

The opinion of the Municipal Court of the Borough of Princeton, dated October 30, 1978, is unreported. A copy is contained in the appendix to the Jurisdictional Statement, starting at JS 49a.[1] The Order of the Superior Court of New Jersey, Law Division—Criminal, dated February 20, 1979, is

[1] "JS . . . a" refers throughout to the appropriate page of the Appendix to the Jurisdictional Statement. "JS . . ." refers to the appropriate page of the Jurisdictional Statement.

also unreported; a copy appears at JS 48a. No written opinion was filed by the court; but at the trial the court orally stated its opinion. The portion of the February 15, 1980, trial transcript containing this statement appears in the Joint Appendix, starting at JA 2a.[2] The opinion of the Supreme Court of New Jersey, dated November 25, 1980, was reported at 84 N.J. 535, 423 A.2d 615, and is set forth at JS 1a.

JURISDICTION

The subject of this appeal is the constitutionality under federal law of provisions in the New Jersey Constitution which, as construed by the state's highest court, would effectively deprive private schools and universities of the right to decide for themselves whether to receive strangers who wish to use their campuses for engaging in expressive activities. Rejecting the contentions of Princeton University ("Princeton") and the State of New Jersey, the Supreme Court of New Jersey—in an opinion issued November 25, 1980 (JS 1a)—upheld Article I, paragraphs 6 and 18, of the New Jersey Constitution as not repugnant to the United States Constitution. On December 19, 1980, the court below denied a timely petition for rehearing. (JS 70a). Princeton and the State of New Jersey filed a Notice of Appeal on March 10, 1981. (JS 71a).

This Court has jurisdiction to review the judgment below by virtue of 28 U.S.C. § 1257(2). *Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 79-80 (1980). Jurisdiction was postponed by this Court on May 18, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First, Fifth and Fourteenth Amendments to the United States Constitution; of Article I, paragraphs 6 and 18 of the New Jersey Constitution; and of New Jersey Statutes Annotated 2A:170-31 (1971), are set forth at JS 2-3.

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[2] "JA . . . a" refers throughout to the appropriate page of the Joint Appendix.

STATEMENT OF THE CASE

Statement of Facts

Appellant Princeton University is a private, not-for-profit, and primarily residential educational institution. (JS 49a, 52a-53a). It is situated in the Borough of Princeton, New Jersey. (JS 1a). Its purposes include the teaching of its students and "the transmission of knowledge and learning to society at large." (JS 28a).

Appellee Chris Schmid was in 1978 a member of the U.S. Labor Party. Neither he nor his party was in any way connected with Princeton University.

On February 15, 1978, appellee entered onto Princeton's campus, uninvited and without permission, to distribute and sell political materials. (JS 4a). A University proctor informed him on that occasion that it was forbidden for persons not connected with the University to enter the campus to solicit support or contributions (unless they had been invited or sponsored), and that if he did so again he would be subject to arrest for trespassing. (JS 3a-4a). Nevertheless, on April 5, 1978, without seeking or receiving permission, appellee again entered the campus to sell and distribute political material. (JS 1a-2a, 49a-50a). He was arrested by a member of the Princeton University Security Department, and was charged with violating New Jersey's general trespass statute, N.J. Stat. Ann. § 2A:170-31 (1971).[3]

In keeping with its purpose of "transmi[tting] knowledge and learning to society at large", (JS 28a), Princeton had issued to the public a blanket invitation to attend lectures, cultural performances, and other events designated as open to the public. (JS 29a). The policy regarding expressive activities *by* the public, however, was narrower.

At the time of appellee's arrest, Princeton had the following policies regarding expressive activity on campus. Members

[3] This statute was superseded in 1979 by N.J. Stat. Ann. § 2C:18-3 (1981).

of the University community could speak freely on campus, subject only to the qualification that they not disrupt essential university operations or significantly infringe on the rights of others. Public speaking on campus by persons *not* connected with the university was also allowed (subject to the same qualifications) in the case of "*speakers whom the students, faculty, or staff wish[ed] to hear*". (JS 2a) (emphasis added). Any member of the University community could distribute political material on campus. (JS 49a). Any person or group *not* connected with the University had to obtain express authorization from a specified University official in order to distribute material or solicit on campus, and such authorization was not granted unless such person or group had an *invitation or sponsorship from a person or organization affiliated with the University.* (JS 49a-50a).

The Proceedings Below

Defendant was tried for trespass in Princeton Borough Municipal Court on October 20, 1978. He was convicted and fined $15 plus $10 costs. A trial *de novo* by the New Jersey Superior Court, Law Division, on February 20, 1979, also resulted in conviction, and the same fine was imposed. Defendant appealed to the New Jersey Superior Court, Appellate Division. While the case was pending there it was certified by the Supreme Court of New Jersey.

At trial, defendant had stipulated to the facts. His sole defense was his contention that the First Amendment to the United States Constitution and Article I of the New Jersey Constitution entitled him to distribute and sell political leaflets on Princeton's property. Princeton—which was invited by the state supreme court to become a party-intervenor in the appeal—did so.[4] Princeton denied that either the federal or the state constitution protected defendant's intrusion on Princeton's

[4] The trial in the municipal court was prosecuted by counsel for Princeton University on behalf of the state, pursuant to Rule 7:4-4(b) of the Rules Governing the Courts of the State of New Jersey, but Princeton was not actually a party at that stage.

campus. It further contended that any law purporting to create such a right of access would be void as violative of Princeton's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. Such a law would, *inter alia*, infringe Princeton's First Amendment right to conduct its own expressive activities without government interference.

The Supreme Court of New Jersey reversed the judgment of conviction, holding that Article I, paragraphs 6 and 18, of the New Jersey Constitution obligated Princeton University to let outsiders use its facilities (subject only to "suitable" restrictions) for the "reasonable" exercise of their "constitutional freedoms of speech and assembly."[5] The court laid down a "multifaceted test" to be applied by courts to ascertain in a given case whether, and to what extent, a private property owner would be required to accommodate speech and assembly on its property by others. The test involves "(1) the nature, purposes, and primary use of [the] property. . . , (2) the extent and nature of the public's invitation to use [the] property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." (JS 27a).

The court upheld, in the face of Princeton's challenge, the federal constitutionality of the state law as construed.[6] It relied upon this Court's holding in *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980), that a state may adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. In a timely petition for rehearing, Princeton argued that the New Jersey court had misapplied *Prune Yard* (which was decided by this Court after the Supreme Court of New Jersey heard oral argument in the present case). The petition for rehearing was denied without opinion, and this appeal was taken.

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[5] The court declined to decide whether the First Amendment also gave rise to a right of access on the facts at bar.

[6] The trial courts did not reach the question, as they held that no right of access was created by the constitutional provisions the defendant relied on.

SUMMARY OF ARGUMENT

Princeton being an educational institution whose property is devoted to expressive purposes, its freedom to determine for itself what expressive activities may take place on its property is protected by the First Amendment through the Fourteenth from state intervention, including judicial intervention. Article I of the New Jersey Constitution as construed by the court below violates the First Amendment in that it requires Princeton to allow strangers to engage in expressive activities on its campus whenever such activities are judicially determined to be consonant with Princeton's educational philosophy. Princeton contends that the judgment as to what is or is not discordant with its philosophy is for Princeton alone to determine. For state officials, including judges, to make such judgments necessarily involves them in weighing the content of the expressive activities involved, and that intrusion is forbidden by the First Amendment.

This Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), should not be read as permitting states to prohibit private abridgment of expressive activity on private property where the property itself is devoted to the expressive activities of the property owner. *PruneYard* found state enforced access to shopping centers by members of the general public for expressive activities inoffensive to the First and Fifth Amendments because of the commercial use of the property. It specifically distinguished enforced access to a shopping center from enforced access to a newspaper (as in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974)), pointing out that the vice of state enforced access in the latter constituted an " 'intrusion into the function of editors'," and noting that the concerns present in *Tornillo* "obviously are not present" in the shopping center context. 447 U.S. at 88 (quoting 418 U.S. at 257). Princeton contends that such concerns *are* present in *this* case, and that for state officials to intrude into the function of educators is similar to their intruding into the function of editors and violates the First Amendment.

As an interested and aggrieved party to the litigation, Princeton has standing to appeal the decision of the Supreme Court of New Jersey.

ARGUMENT

I

The decision below, in contravention of the First and Fifth Amendments, interferes with the freedom of Princeton University and other private educational institutions to pursue educational objectives without state interference.

A. The First Amendment protects "academic freedom" as a "special concern."

Universities, public or private, are so involved with the values which the First Amendment secures from governmental interference as to make "[t]he freedom of a university to make its own judgments as to education . . . a special concern of the First Amendment." *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978). A community of scholars engaged in research and education—the search for knowledge and its dissemination—is central to the purposes of a university and to "the pursuit of truth which the First Amendment was designed to protect." *Adler v. Board of Education*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting). Unfettered educational choices are as crucial to the function of a university as the editorial choices of a newspaper. Like a newspaper,[7] and unlike a company town[8] or a shopping center,[9] the property of a University is devoted to expressive purposes and is constitutionally protected from governmentally mandated access.

As Justice Frankfurter eloquently argued in his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), a free society demands "the exclusion of governmental intervention in the intellectual life of a university".[10] 354 U.S. at

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[7] See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[8] See *Marsh v. Alabama*, 326 U.S. 501 (1946).

[9] See *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[10] An early illustration of the educational autonomy of the English universities is *Dr. Bonham's Case*, 77 Eng. Rep. 646, 8 Co. Rep 113b (Hil. 7 Jac. 1). There Lord Coke found a statute requiring examination and certification of persons practicing medicine inapplicable to a graduate of Cambridge because "it ought to be presumed, every doctor of any of the universities to be within the statutes, *sc.* to be profound, sad, discreet, groundly learned, and profoundly studied." *Id.* at 651, 8 Co. Rep. at 117a.

262. The vice of the New Jersey court's interpretation of Article I of the New Jersey Constitution is that it makes government, not the University, the judge of what is or is not "discordant" with Princeton's educational philosophy. (JS 28a—30a). If it is open to government to interpret what is or is not consistent with a university's educational philosophy, "the freedom of a university to make its own judgments as to education" is substantially diminished. The prohibition of the First Amendment cannot be reduced to a mere need for state government to "give substantial deference to the importance of institutional integrity and independence" and to "accord" private colleges and universities "a generous measure of autonomy and self-governance". (JS 31a).

In the importance to a free society of preserving educational judgments from governmental interference there should be no distinction between public and private universities. But there are differences in how the First Amendment operates to achieve this objective and, accordingly, in the nature of the intellectual life and educational philosophy both permitted and protected. These differences stem from the fact that public universities are the creation of government and are thus, in a sense, governmental entities themselves. The First Amendment operates to protect one part of government from another; or, more precisely, to protect educational judgments in public universities from interference by other governmental bodies on political, religious, or ideological grounds.

Private universities do not carry the burden of being governmental entities. Accordingly, they enjoy the protections of the First Amendment in their unconstrained philosophical and curricular choices.[11] Thus a private university may choose an educational philosophy which seeks to expose students to widely differing viewpoints, as does Princeton, or it may choose to indoctrinate students in a particular ideology or set of beliefs. The choice to create a liberal educational atmosphere, the

[11] *See Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 634-39 (1819).

choice to espouse a particular cause or doctrine, and all choices in between the extremes are exercises of rights guaranteed by the First Amendment against governmental interference.

That same range of choices is not open to public universities because, as creations of government, they are subject to the constraints on government embodied in the First and Fourteenth Amendments. Unlike private universities, they are not free to adopt an educational philosophy confined to a particular religious, political or ideological viewpoint; their educational philosophy and curriculum must be essentially secular—and from an institutional viewpoint—politically and ideologically balanced. That ideological balance or neutrality is maintained by protecting through the First Amendment the free speech of those who teach from interference by other state entities.[12] *Bakke* and *Sweezy*, both involving state universities, illustrate how the Bill of Rights operates both to restrict and protect freedoms of state educational institutions.

What at first blush is difficult to understand is simply that the educational policy choices guaranteed to private universities by the First Amendment are denied to public ones *for the same First Amendment reasons.* Who speaks—whether a private or a public entity—is obviously a crucial factor in a constitutional protection of speech written as a limitation on government. Accordingly the First Amendment would protect a private institution from governmental interference (including judicial interference) in its efforts to instruct students in a particular orthodoxy, yet would require the same judicial interference to prohibit a public institution from attempting the same objective. The state may not interfere in the choice of a particular educational philosophy in a private institution whether that choice is, like Princeton's, geared to an uncircumscribed search for knowledge or whether it is geared to propagating particular

[12] Academic freedom is, of course, especially important to those who teach as well as to the institutions at which they teach, be they public or private. Princeton University is totally committed to the freedom of its faculty and students to pursue knowledge in their own way without interference by governmental or other authority.

dogmas. Similarly it cannot require that those who teach in public institutions subscribe to and instruct in such dogmas. In each instance the First Amendment protects the educational process from political control and promotes the values of free speech and association.

To the extent a public university opens its campus or other facilities to the general public, it must do so in a nondiscriminatory manner. If it permits its campus to be used by members of the general public for various expressive activities it must, in common with other governmental entities, be neutral as to their content and regulate them in a reasonable manner only as to time, place and manner. It cannot, for example, permit one political candidate to address students and bar another, or permit pamphlets to be distributed by advocates of capitalism and bar those advocating socialism. *See Brubaker v. Moelchert*, 405 F. Supp. 837 (W.D.N.C. 1975). Just as it is not permitted an educational policy which advocates particular political or religious views, it may not use its campus any more than its classrooms for forbidden objectives.[13]

In the case of a private university, where governmental constraints on educational policy are forbidden by the First Amendment, expressive activities on university property may or may not conflict with its educational purpose. The court below acknowledged this possibility when it weighed "the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." (JS 27a). Because Princeton's educational policy encouraged a variety of differing views and, where speakers were invited by a member of the university community, censored none, it would

[13] If, as in this case, a state university permitted use of its physical property for expressive purposes only by those members of the public invited to speak by faculty or students, the ideological neutrality required by the First Amendment would seem to be present. Furthermore, leaving such choices to members of the university community would ordinarily be regarded as a legitimate implementation of educational policy and immune from governmental interference as protected academic freedom.

be easy to conclude, as did the court below, that nothing said on its campus could be offensive to its educational policy. In one sense that conclusion would be correct; it is easy to differentiate Princeton's educational philosophy from that, for example, of private institutions dedicated to propagating particular doctrines. But to do so is to miss the crucial point.

Princeton's choice of its educational philosophy is a choice protected by the First Amendment. So, too, is the method by which it is implemented. The test adopted by the New Jersey court denies to Princeton and other private educational institutions the right to determine what expressive activities are or are not "discordant" with their educational philosophy. That right is protected by the First Amendment and the making of that judgment forbidden to governmental authority.

B. Where private property is devoted to the expressive activities of the owner, any state requirement that the expressive activities of others be permitted contravenes both the First and Fifth Amendments.

The effective realization of a free society depends upon the ability to use one's economic as well as one's intellectual resources in exercising First Amendment rights. A private university cannot function without control over the use to which its property is put. Ownership is fundamental to privacy and to the freedom of association which underlies education.

This point was eloquently stated by the Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1971) (citations omitted):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

It was, of course, precisely that false dichotomy which misled the court below. It failed to appreciate that by

diminishing Princeton's property rights it diminished its expressive rights as well, and that diminishing its expressive rights was forbidden by the First Amendment.

If, as Princeton contends, the New Jersey Constitution as interpreted below conflicts with the First Amendment, there is no need to show that it conflicts with the Fifth as well. *See Metromedia, Inc. v. City of San Diego,* 49 U.S.L.W. 4925, 4933-34 n.25 (U.S. July 2, 1981). But it is important to observe the interrelation of expressive and property rights. The right to use private property for those expressive purposes for which one has acquired that property is a fundamental right. When a private person or institution uses property to advocate certain ideas and not others, that is an exercise of choice protected from governmental interference by the First Amendment. *See Buckley v. Valeo,* 424 U.S.1 (1976). For the owner of private educational property it is a choice which can be made effective only if his basic property right to exclude those he wishes to exclude is not diminished.

Ever since the early history of English-speaking universities, the importance of university control over the university grounds has been recognized. This control has been viewed as an important incident to the university's ability to create an atmosphere conducive to learning and to the interchange of ideas between faculty and students.

Throughout English history, intrusion by outsiders on university campuses was a consistent source of interference with the educational atmosphere, leading not infrequently to violence between students and townspeople on the university grounds. Other concerns arose because of "the bitter animosity which aggravated town-and-gown rows of the thirteenth and fourteenth centuries [leading to] sanguinary conflicts sometimes bordering on civil war."[14] One of the most notorious of these violent encounters occurred at Oxford University on St. Scholastica's Day in 1354. On this occasion, there was a three day riot, part of which "was spent by the victorious towns-

[14] G. Brodrick, *A History of the University of Oxford* 43 (1900).

people in glutting their savage vengeance, pillaging hall after hall and killing or wounding any scholar who fell into their hands."[15] In the aftermath, the King reaffirmed and strengthened the powers of the University to control activities within university grounds. In order to avoid such disturbances, the universities asserted, and were permitted to assert, extensive control.[16]

Problems like these—which are not unique to England[16a]—have continued down to the present day, and Princeton continues to regard its control over the university grounds as indispensible to the educational atmosphere which it seeks. Teaching and exchange of ideas occur not only in the classroom but on the walkways and grounds of the campus, where students speak to students, professors with professors, and professors with students. In what manner and to what extent persons who are not members of the University community may contribute to this educational process are educational decisions. So, too, is the effort to create on the campus that balance between openness and privacy which is judged most conducive to educational pursuits—a balance required by the fact that some scholars and students feel most productive in one such atmosphere, others in another. A policy which places responsibility on members of the community to issue invitations also helps to insure that speakers be treated with courtesy and

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[15] *Id.*

[16] Indeed, as early as 13th century England, it was regarded as important for a university not only to have control over its own property, but to exercise its own criminal jurisdiction over offenses committed on that property. For instance, various charters granted to Oxford during the reign of Edward I steadily increased the powers of Oxford University within its own boundaries. The Agreement of 1290, in particular, gave Oxford University broad powers with respect to the surrounding town. Among other things the University Chancellor was given jurisdiction in most civil and criminal cases in which one of the parties was a student at Oxford. 1 C. Mallet, *A History of the University of Oxford* 162-63.

[16a] *See, e.g.*, Porter, *The Oxford-Cap War at Harvard*, in *Student Activism, Town and Gown in Historical Perspective* 273 (A. DeConde ed. 1971).

respect—an important factor in turbulent times. And surely the well-founded reluctance of an academic community to invoke the police powers of the state is a factor in differentiating between members of the academic community (who are subject to informal constraints and disciplinary procedures) and others (who are not) in their campus activities.

To be sure, some of these considerations could be dealt with on most campuses by neutral time, place and manner regulations. Princeton is presently experimenting with such rules. But that choice should be Princeton's,[17] not the court's. Determining institutional policies regulating access is, historically, distinctively related to the nature and purposes of academic communities and to a long tradition of self-governance.

Courts have generally recognized the importance to the educational process of university control over university property. As early as 1915 this Court held in *Waugh v. Board of Trustees*, 237 U.S. 589 (1915), that the state, in operating its public educational institutions, could properly prohibit fraternities on its campuses, against a claim that the students' Fourteenth Amendment rights were thereby impaired. The Court found that the regulation "may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions." *Id.* at 596-97.

Thus, colleges and universities have been held to have inherent authority to promulgate rules and regulations in order to structure the extracurricular experience and environment on campus in a manner consistent with their educational philosophies.[18] This includes the power to regulate the on-campus

[17] These decisions are made at Princeton through regularly constituted bodies in which administrators, faculty and students participate. In Princeton's view, the decision-making process itself has important educational components.

[18] *Speake v. Grantham*, 317 F. Supp. 1253, 1265 (D. Miss. 1970), *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971).

behavior of students as well as the use of university property.[19] As the court noted in *Smith v. Ellington*, 334 F. Supp. 90, 93 (E.D. Tenn. 1971): "A University campus is primarily for the students, faculty and administrators and when visitation on the campus of non-students interferes with normal activities of the school, the officials of the school not only have the right to intercede, but it is their duty."

Moreover, the federal courts have consistently rejected what the Supreme Court of New Jersey in effect has accomplished here—requiring private institutions of higher learning to submit to constitutional and statutory requirements designed to regulate governmental behavior.[20] *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968).

In sum, a university's control over its grounds is far different from the owner of a massive shopping center seeking to bar leafleting in its public areas. Just as a university has an important interest in setting its academic standards, in establishing its curriculum, in appointing its faculty and admitting its students, so too does it have an interest in insuring that it controls and regulates activities on its campus which it—not government— judges conducive to its educational mission.

II

The New Jersey Constitution requires governmental agencies to pass judgment on the content of expressive activity in violation of the First and Fourteenth Amendments.

In its opinion below, the Supreme Court of New Jersey adopted a three part test for determining whether an outside speaker may appear on the campus of a private university, taking into account "(1) the nature, purpose, and primary use

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[19] *Id. See Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968).

[20] The Supreme Court of New Jersey, in its opinion below, itself noted the long line of cases holding that actions by private universities do not constitute state action. (JS 9a).

of such private property, generally its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." (JS 27a). Under its decision, the university is compelled to open its property to individuals outside the university who wish to speak on university grounds if the court finds, under the particular circumstances of the case, that such activities are not "discordant" or "incompatible" with the university's own activities. (JS 29a-30a). The court below found no such discordance or incompatibility in the circumstances of this case.

Ironically, under the second part of the court's test, the more a university opens its grounds to enable some speakers to engage in campus activities, the more obligated it becomes to admit other speakers. Moreover, the third element of the test seems to call for content-based decisions by the courts, without specifying the criteria by which such decisions are to be made. Thus, while faulting Princeton for not itself having detailed standards for admission of outside speakers, (JS 33a), the Supreme Court of New Jersey has created a standard which is so vague and uncertain as to leave almost unbounded discretion in determining whether particular activities are "discordant" or "incompatible" with "Princeton University's professed educational goals [and] the University's overall use of its property for educational purposes," (JS 29a-30a). The application of such a vague and uncertain standard is clearly impermissible in this sensitive First Amendment area. *Kingsley International Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 694 (1959) (Frankfurter, J., concurring); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952) (the reviewing body should not be cast "adrift upon a boundless sea").

Where an arrest for trespass is contemplated, the arresting officer, the prosecuting attorney and the courts are all involved in balancing and evaluating the content of expressive activity. And the very complexity of the test, coupled with its vague

general standards, makes that content judgment all the more dangerous to the freedom of speech and association so fundamental to education.[21]

What is required of government where the content of speech is involved is both a clear standard and neutrality. Where expressive activities on governmental property are involved, government regulations must give adequate notice and be content neutral: time, place, and manner.[22] Courts may review such regulations to insure that they are reasonable in terms of such neutral standards as traffic congestion, public convenience, and the like and that the regulations themselves do not directly or indirectly judge content on their face or in their administration. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 49 U.S.L.W. 4762 (U.S. June 22, 1981); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). Where, under either the First Amendment or state law, expressive activities have been protected from private abridgment, the private property owner has been treated as if he were governmental authority and subjected to the same neutral time, place and manner standards. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Robins v. Prune Yard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 347, 153 Cal. Rptr. 854 (1980). *See Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). Any other test necessarily involves courts in content evaluation—as the decision below so clearly demonstrates.

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[21] *Cf. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126-27 (1973) (A right-of-access to radio and television for broadcasting paid editorial advertisements would give rise to a problem of "critical importance to . . . the First Amendment" in that the enforcement authority would tend to be "draw[n] into a continuing case-by-case determination of who should be heard and when.")

[22] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), *quoted in Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

When state authority enforces a trespass statute in the ordinary manner it is acting in a neutral way. Enforcing the property owner's decision as to what may or may not be said on his property, and by whom, does not involve any government official in judgment as to the content of the ideas, their merit, or their compatibility with other ideas. Such enforcement merely preserves the property owner's ability to determine for himself the expressive uses of his property, thus protecting and enhancing the ground rules of free public debate essential to the political freedom protected by the First Amendment. The fact that Princeton encourages the free exchange of ideas on its campus does not make that educational policy and its implementation any less a matter of choice free from governmental intervention than would be the case were Princeton to have a policy confined to instruction in some particular orthodoxy.

The court below did not seek to restrict expression on the basis of governmental judgment as to the merits of subject matter or content. It examined that content under a different standard: Is it or is it not compatible with the property owner's primary use of the property? However, by "use" the court below includes both intellectual and physical use; only the latter is content neutral. It is Princeton's contention that, where private property is devoted to First Amendment purposes such as education, that judgment is not for government to make. To hold otherwise is to involve government officials in judgments which—precisely because they involve evaluations of content—cannot avoid having a chilling effect on the exercise of free speech. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127-28 (1973).

The fact that Princeton's educational philosophy is itself so open and friendly to all ideas should not be permitted to obscure or trivialize the seriousness of the underlying principle. What is offensive to Princeton is not the content of appellee's speech. It is his refusal to abide by Princeton's rules respecting visitors on campus. Those rules are geared to Princeton's

educational policy, and it is constitutionally wrong for state officials to determine what that policy is or what activities are consonant with it. And the standard which the court below applied to Princeton would, when applied to colleges and universities with less catholic views of education, obviously involve judges in determining what was or was not consonant with a whole range of vastly different but constitutionally protected ideas and ideologies.

III

The State of New Jersey may give greater protection to expressive activity under its laws than that required by the First Amendment, but it may not give less.

There has never been any constitutional doubt that state courts could invoke state constitutions to limit state authority over expressive activity in circumstances where the First Amendment would not have required the same result. Similarly states can create personal rights which serve to expand the freedom of speech and assembly beyond what is guaranteed by the Federal Constitution. But a state may not deprive a person of rights secured from state interference by the First Amendment even if the state is firmly convinced—as the court below undoubtedly was—that the values underlying the freedoms of speech and assembly would thereby be promoted. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), 260-61 (White, J., concurring). *See also Buckley v. Valeo,* 424 U.S. 1, 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .").

PruneYard Shopping Center v. Robins reaffirms those principles. It holds that the fact that expressive activities by members of the general public in a privately owned shopping center are not protected by the First Amendment from private abridgment does not preclude states from protecting those activities. But since *PruneYard* is central to the decision below it should be examined in deeper perspective.

The political and social values which underlie freedom of speech and communication require that persons have reasonable access to channels of communication. Both courts and commentators have expressed concern at the increasing concentration of private ownership of means of communication, and the disappearance of traditional forums due to the growth of large private shopping centers and residential developments, or the relative scarcity of radio and television frequencies. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-02 (1973); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 323-25 (1968); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376, 388-89, 396 (1969); Emerson, *First Amendment Doctrine and the Burger Court*, 68 Cal. L. Rev. 422, 461 (1980); Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Berger Court*, 43 Law & Contemp. Prob. 66, 77-78 (No. 3 1980); Note, *Private Abridgment of Speech and the State Constitutions*, 90 Yale L. J. 165, 167-71 (1980). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248-51 (1974). Governmental intervention to promote expressive activities through enforced access to scarce channels of communication obviously raises delicate and difficult questions; after all, governmental intervention has traditionally been viewed as the principal threat to such activities.

Leaving aside the extraordinarily difficult problems of federal regulation of broadcasting, problems of access have typically arisen in two kinds of situations: first, those where traditional public forums such as public streets and parks in business districts and residential areas have increasingly been replaced by private shopping centers, private industrial parks, private corporate centers, and large private residential developments, *e.g., Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Laguna Publishing Co. v. Golden West Publishing Corp.*, 110

Cal. App.3d 43, 167 Cal. Rptr. 687 (Ct. App. 1980); second, those where the prospective listeners are residents of old-age villages or homes or of migrant worker camps, *e.g., Illinois Migrant Council v. Campbell Soup Co.*, 574 F.2d 374 (7th Cir. 1978); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973); *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971); *Freedman v. New Jersey State Police*, 135 N.J. Super. 297, 343 A.2d 148 (1975); *State v. Kolcz*, 114 N.J. Super. 408, 276 A.2d 595 (Middlesex County Ct. 1971). The two types of situations raise different policy considerations: in the first, channels through which thousands of people can be efficiently reached; in the second, the desirability of ensuring that relatively immobile residents can be informed of political issues.

In all these situations it is the private ownership of the property involved which is the proferred basis for curtailing expressive activities. To the extent free speech is abridged, it is abridged by private, not governmental, action. Thus, conceptually, it is difficult to reach under the language of the First Amendment.

Nonetheless, in *Marsh* this court held that the First Amendment protected expressive activities in company towns and that private ownership of the property involved was insufficient reason for differentiating a company town from any other municipality. 326 U.S. at 509. The private owners were subjected to the same neutral standards of regulation as public officials. Nor did this Court view imposition of those standards on the property owners as being inconsistent with their constitutionally guaranteed property rights. *Id.* At 506-07, 509.

While this Court has been narrowly divided on the question it has concluded that the First Amendment does not protect free speech in a privately owned shopping center. *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens* the court stated: "Thus, while statutory or common law may *in some situations* extend protection or private redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitition itself." *Id.* at 513 (emphasis added).

The Supreme Court of California, interpreting the California Constitution, found that in California the growth of privately owned shopping centers replacing downtown business districts posed a threat to the state's political processes if areas equivalent to such traditional channels of communication as public streets were foreclosed to those seeking to exercise state constitutional rights of petition and recall. Accordingly, it interpreted the state constitution to require the private owners of shopping centers to permit expressive activities on their properties subject only to neutral time, place and manner regulations. *Robins v. Prune Yard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979). This Court affirmed, finding no Fifth Amendment "taking" and in the circumstance of private property used as a shopping center, no First Amendment deprivation of the property owner's expressive rights. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 85, 88-89 (1980). Both results were clearly foreshadowed by this Court's opinions in *Marsh* and (despite its limitation by *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and its subsequent overruling by *Hudgens*) in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

In none of the decisions by this Court in *Marsh* or the early shopping center cases was there discussion of any claim by the owner of the private property that he was being deprived of his own First Amendment rights. In *Prune Yard* the property owner raised this possibility for the first time and this Court rejected it in the shopping center context. The contention there was that a property owner could not "be forced by the State to use his property as a forum for the speech of others" and that this infringed his own constitutional right as a potential communicant. 447 U.S. at 485-87. There was no contention that the property was in fact used for such purposes by the owner, and certainly not that such a protected use was its primary—or even an important—function from the owner's viewpoint. It was a shopping center, open to the general public for commercial purposes; it was in no sense an entity with the broad expressive purposes of a University.

Appellant's First Amendment contentions in *PruneYard* were all encompassing. *All* owners of private property are *potential* communicants, and for this Court to have found in that mere potentiality deprivation of a constitutional right would have all but eliminated the situations for permissible governmental protection against private abridgment that were mentioned in *Hudgens*. What *PruneYard* held is that state enforced access to channels of communication is constitutionally permissible in situations where the use of the property is commercial and a legitimate state policy of access is promoted. But, as *PruneYard* recognized, the result is different when the enforced access is to property being used for First Amendment purposes. *Id.* at 88; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

In *Tornillo* this Court struck down a Florida law giving political candidates a right to reply to press criticism. It was "vigorously argue[d] that government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 247-48. The increasing power of the press—and the political need to dilute that power by providing greater access—were urged as justification for the statute, which was said to be aimed at implementing more effectively the policies underlying the First Amendment. This Court responded, *id.* at 254 (emphasis added, footnote omitted):

> However much validity may be found in these arguments, at each point the implementation of a remedy *such as an enforceable right of access* necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment.

This Court continued, *id.* at 258 (footnote omitted):

> Even if a newspaper would face no additional costs to comply with a compulsory access law . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for

> news, comment and advertising. The choice of material to go into a newspaper . . . whether fair or unfair . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

In *Prune Yard,* arguments of the property owner based on *Tornillo* were rejected on the ground that *Tornillo* " rests on the principle that the State cannot tell a newspaper what it must print ... Thus, the statute was found to be an 'intrusion into the function of editors' . . . *These concerns obviously are not present here.*" 447 U.S. at 88 (emphasis added, citations omitted).

The differences between subjecting editorial judgments "whether fair or unfair" to governmental interference and requiring the private owners of shopping centers to apply neutral standards of time, place and manner to expressive activities on their premises are manifest. The danger to First Amendment values in subjecting editorial judgments to government scrutiny and control are real and obvious. Equally real and obvious are the dangers of subjecting the educational policy of universities to judicial review to determine whether or not expressive activities by strangers are compatible with that educational policy. The concerns not present in *Prune Yard* clearly *are* present here.

Indeed, in one respect this case presents an even stronger First Amendment issue than did *Tornillo.* In *Tornillo* the argument in support of the state law was, as in *Prune Yard,* legitimately related to promoting access to an important channel of communication in factual circumstances which were thought to justify *enforcing* intrusion because of the absence of practical alternatives. In this case, the need for access to Princeton's property by strangers for expressive activity is not a basis for the state policy; indeed, the court below affirmed the existence of "ample alternative locations other than the property of the University itself as means for the dissemination of information, views, and ideas." (JS 14a). With no felt need to

provide access to scarce or contracting channels of communication, the New Jersey court nonetheless intruded governmental judgment and control in violation of Princeton's First and Fifth Amendment rights.

The vague standard adopted by the court below, coupled with the court's apparent willingness to evaluate the content of speech against educational objectives, leaves uncertain how far the New Jersey Constitution would permit governmental intrusion into educational matters. Access to the campus for expressive activity is but one example of a large set of determinations that could be measured against a state's view of what it believes constitutes "freedom of expression." It is considerations such as this that have led this Court to view academic freedom as a special concern of the First Amendment and to insure that educational judgments are protected from governmental interference.

IV

Princeton University has standing to appeal the decision below.

Princeton was a party to the proceeding below, having accepted the invitation of the Supreme Court of New Jersey to intervene in defendant's appeal. As a party with an interest who is aggrieved by the decision of the court below, Princeton has standing to appeal that decision.[23] The State of New Jersey has also appealed.

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[23] The requisites for standing to appeal are: that the person seeking review have been a party below, *e.g., In re Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); that the party have a personal interest in the litigation, *e.g., Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 83 (1958); *Williams v. Morgan*, 111 U.S. 684 (1884); *In re Michigan-Ohio Building Corp.*, 111 F.2d 191 (7th Cir. 1941); *King v. Buttolph*, 30 F.2d 769 (9th Cir. 1929); and that the party be aggrieved by the judgment sought to be reviewed, *e.g., Swann v Adams*, 385 U.S. 440, 443 (1967); *Lewis v. United States*, 216 U.S. 611 (1910); *United States v. Shelley*, 218 F.2d 157 (2d Cir. 1954).

CONCLUSION

The decision of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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